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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL E. SMOCK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 15A01-0609-CR-381
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE DEARBORN CIRCUIT COURT
The Honorable James D. Humphrey, Judge
Cause No. 15C01-0312-FB-027

May 24, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Appellant, Michael E. Smock, challenges the trial court's revocation of his probation. Upon appeal, Smock presents two issues, which we restate as: (1) whether the evidence was sufficient to support the trial court's decision to revoke Smock's probation; and (2) whether Smock received the effective assistance of counsel.

We affirm.

The record reveals that the State charged Smock on December 9, 2003 with one count of burglary as a Class B felony, one count of conspiracy to commit burglary as a Class B felony, one count of theft as a Class D felony, and one count of receiving stolen property as a Class D felony. On September 21, 2004, Smock pleaded guilty to the count of Class B felony burglary in exchange for dismissal of the remaining charges. On October 19, 2004, the trial court sentenced Smock to the presumptive term of ten years incarceration with nine years thereof suspended to probation.

On February 28, 2005, the State filed a request for a probation violation hearing, and at the subsequent March 1, 2005 hearing, the trial court found that Smock had violated the terms of his probation and revoked one year and 180 days of Smock's probation.[1] On July 25, 2006, the State filed another notice of probation violation. A hearing on this matter was held on August 10, 2006. At the hearing, the State presented evidence that Smock had been seen at the Elsbury Trailer Court, which was apparently in violation of the terms of his probation. We say "apparently," because we have been unable to locate any copy of the terms of Smock's probation. However, at the revocation hearing, the trial court asked Smock if he knew that one of the conditions of his probation

[1] The record before us does not reflect the nature of the 2005 probation violation.

was "to not go to that location," i.e., the trailer court where he was seen. Tr. at 12. Smock responded, "Yes." Id. Indeed, the State argued that the reason that Smock was not allowed at the trailer court was that that was where he had committed the burglary which resulted in him being placed on probation.

Further, the State introduced into evidence a letter written by Smock and addressed to the deputy prosecuting attorney in which Smock stated, "I am writting [sic] in regards to my charge a [sic] Probation Violation, for being in Elsbury trailer court. . . . I know it was a part of my probation to not go into Elsbury trailer court and I seriously regret that I did." State's Exhibit 1. Smock claimed in the letter that he was there to visit his family. Smock's attorney argued that the violation was "technical" in nature and noted that Smock was only there to visit family and had not committed any crime in going to the forbidden location. The trial court, noting that Smock had violated the terms of his probation once already, rejected Smock's plea for leniency and revoked his probation. Smock's attorney then informed the trial court that Smock was claiming that he did not know that the probation revocation hearing was to occur that day and that he "thought he would have a chance to get another plea agreement." Tr. at 14. The deputy prosecuting attorney explained to the trial court that he had offered a plea agreement to Smock earlier that morning, but Smock had rejected the offer. The trial court ordered that Smock serve executed the remainder of his sentence, i.e. seven years and 185 days. Smock filed a notice of appeal on September 1, 2006.

Upon appeal, Smock claims that the evidence is insufficient to support the trial court's decision to revoke his probation. Specifically, Smock reiterates the argument he

made to the trial court: that his violation was "trivial" and "technical" and does not justify the court's decision that he serve the remainder of his sentence executed. We note that a probation hearing is civil in nature and the State need only prove the alleged violations by a preponderance of the evidence. Cox v. State, 706 N.E.2d 547, 551 (Ind. 1999). We will consider all the evidence most favorable to the judgment of the trial court without reweighing that evidence or judging the credibility of witnesses. Id. If there is substantial evidence of probative value to support the trial court's conclusion that a defendant has violated any terms of probation, we will affirm its decision. Id.

Here, Smock admitted that he was at the trailer park and that he was specifically forbidden by the terms of his probation to go there. Smock had already violated the terms of his probation once and, by reason of minimal incarceration for the violation had, in effect, been given a second chance. Yet he subsequently again violated his probation. Although serving over seven years for a seemingly minor violation of probation might be viewed as harsh, we are mindful that Smock was not being "punished" for being at a trailer court, but for committing a Class B felony. See id. (noting that a defendant is not entitled to serve a sentence on probation, but instead placement in such is a matter of grace and a conditional liberty which is a favor, not a right). Given the facts before the trial court, we cannot say its decision to revoke Smock's probation was erroneous.

Smock also claims that he did not receive the effective assistance of counsel at his probation revocation hearing. Specifically, Smock claims that his trial counsel only met with him for approximately five minutes prior to the revocation hearing; that although his

counsel relayed the State's plea offer,[2] he did not fully explain the offer or the risks of rejecting it; and that Smock did not realize that the State would not make further offers. Smock also complains that his counsel called no witnesses, not even Smock himself, to explain why Smock was at the trailer court—to visit his mother and sister.

As explained by our Supreme Court in McCorker v. State, 797 N.E.2d 257, 267 (Ind. 2003), claims of ineffective assistance of counsel are governed by the two-part test announced in Strickland v. Washington, 466 U.S. 668 (1984). First, the defendant must show that counsel's performance was deficient by falling below an objective standard of reasonableness and that the resulting errors were so serious that they resulted in a denial of the right to counsel guaranteed under the Sixth Amendment. McCorker, 797 N.E.2d at 267. Second, the defendant must show that the deficient performance prejudiced his defense. Id. Prejudice is shown with a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. A "reasonable probability" is a probability sufficient to undermine confidence in the original outcome of the proceeding. Id. Counsel is presumed competent, and a defendant must offer strong and convincing evidence to overcome the presumption that counsel prepared and executed an effective defense. Oliver v. State, 843 N.E.2d 581, 591 (Ind. Ct. App. 2006), trans. denied.

Smock claims that his trial counsel failed to properly advise him with regard to the plea offer by the State and the consequences of failing to accept the plea. To be sure, the failure to convey a plea offer from the State is a denial of effective assistance of counsel.

[2] Apparently, the State offered one-year incarceration for the probation violation.

Gray v. State, 579 N.E.2d 605, 607-08 (Ind. 1991). Here, Smock's counsel did convey the plea offer; Smock simply claims he was not adequately advised with regard to the consequences of his decision to reject the offer. However, Smock offers no real evidence on this point other than his self-serving claims.[3] Smock's claim that he would have accepted the plea offer had he known it was the State's "final offer" is retrospective and similarly self-serving. Moreover, Smock points to no authority suggesting that he had any right to further offers by the State. Hindsight may be 20/20, but we do not judge counsel's performance "through the distortions of hindsight." Timberlake v. State, 753 N.E.2d 591, 605 (Ind. 2001), cert. denied, 537 U.S. 839 (2002). Suffice it to say that Smock has not convinced us that he did not receive the effective assistance of counsel with regard to his counsel's alleged failure to properly advise him with regard to the State's plea offer.

Smock also claims that his counsel should have called Smock himself as a witness to testify that he was at the trailer park to visit his mother and sister and that his mother and sister should have been called as witnesses to explain why he was there (allegedly to help his family move). We observe that Smock's counsel was faced with a client who had been caught at a location he was specifically forbidden to be by the terms of his probation and a letter written by that client admitting to being there and admitting that he

[3] This is precisely why it is preferable to present claims of ineffective assistance of counsel in post-conviction proceedings. DeWhitt v. State, 829 N.E.2d 1055, 1065 n.7 (Ind. Ct. App. 2005). This is so because presenting such a claim often requires the development of new facts not present in the trial record. Id. A defendant may choose to raise a claim of ineffectiveness of counsel on direct appeal, but if he does so the issue will be foreclosed from collateral review. Id.

knew he was not supposed to be there. Counsel's cross-examination was not lengthy, but it focused upon Smock's claim that he was only at the trailer court to visit his family. Smock's counsel also argued to the trial court that Smock's violation was relatively minor and did not justify the execution of the remainder of his sentence. Thus, Smock's counsel did present to the trial court Smock's excuse for being at the trailer court. Smock does not explain how, had he or his mother or sister been called to corroborate his claim that he was at the trailer court to visit his family, the trial court's ultimate decision to revoke his probation and order him to serve the remainder of his previously-suspended sentence would have been different. Given the task before him, we cannot say that, by failing to call Smock or his mother or sister as witnesses, Smock's counsel's performance fell below an objective standard of reasonableness.

In summary, Smock admitted to violating a specific term of his probation, and the trial court's decision to therefore revoke Smock's probation was supported by sufficient evidence. Further, given the facts of this case, we cannot say that Smock was denied the effective assistance of counsel.

The judgment of the trial court is affirmed.

SHARPNACK, J., and CRONE, J., concur.